In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1264

HAROLD DAVID GIBBS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the District of Arizona, petitioner and one Fernandez-Ortiz were convicted on two counts of knowingly receiving, concealing and facilitating the transportation and concealment of approximately 105 pounds of illegally imported marihuana, in violation of 21 U.S.C. 176a, and of conspiracy to violate that statute (Tr. 11–12, 122).[1] Each was sentenced to concurrent prison terms of five years. The court of appeals affirmed (Pet. App. A).

[1] "Tr." refers to the trial transcript, a copy of which we are lodging with the Clerk of this Court.

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The evidence at trial[2] disclosed that on April 29, 1969, shortly after 8:00 p.m., customs agent Holgerson received a tip from an informer concerning a planned narcotics transaction in Nogales, Arizona. On the basis of that tip, he went to a supermarket parking lot located about a third of a block from the international border. As he had been advised, he found there a 1955 Buick and a Ford pickup truck parked together, both of which had Mexican license plates. A strong odor of marihuana was detected in the immediate area. (Tr. 25–27.)

At about 8:30 p.m., Holgerson observed petitioner, Fernandez-Ortiz and another person approach the two vehicles. Petitioner walked around the Buick and the other two remained at the rear of the vehicles. The three then left the parking lot and went to a location about a block away where they appeared to confer. Shortly thereafter petitioner and Fernandez-Ortiz returned to the parking lot but again walked away. (Tr. 28–31.)

After they left another customs agent (Cavitt) discovered under the Buick a special metal compartment welded to the frame and containing green packages. The odor of marihuana was very strong under the car. Holgerson confirmed these observations. (Tr. 31, 39, 74.) At about 9:00 p.m., Fernandez-Ortiz reappeared and drove the Ford pickup out of the parking lot and across the border into Mexico (Tr. 31, 75–

[2] Petitioner has abandoned contentions raised below as to the denial of his motion to suppress evidence of the marihuana. Accordingly, only the trial testimony will be referred to here.

76). At approximately 9:45 p.m., petitioner and Fernandez-Ortiz re-entered the parking lot. Petitioner removed the Mexican license plates from the Buick and replaced them with California plates, while Fernandez-Ortiz looked up and down the street (Tr. 32, 77–78). At about 10:00 p.m., petitioner drove the Buick out of the parking lot. After making several turns, he headed northward away from the Mexican border. He was stopped and arrested by the agents, who had followed him (Tr. 32–33, 54–55). A search of the compartment underneath the Buick resulted in the seizure of 75 packages of marihuana weighing approximately 105 pounds (Tr. 22–24, 34).

Petitioner challenges the sufficiency of the evidence to show that the marihuana seized was of foreign origin and was unlawfully imported. The district court refrained from relying on the presumption from possession under 21 U.S.C. 176a, but instead charged the jury that it had to find that the marihuana had been illegally imported and that the defendants knew that fact (Tr. 111–112, 116); petitioner asserts that because the evidence on these points was so scanty, the presumption "was tacitly employed" (Pet. 2), and that its "tacit" use contravenes the principles enunciated in *Leary* v. *United States*, 395 U.S. 6."[3]

[3] Petitioner does not suggest that he had no knowledge that the marihuana was illegally imported—the precise issue as to which *Leary* invalidated the presumption under 21 U.S.C. 176a. As the court below concluded (Pet. App. A5), the activities of the defendants support the jury's inference of actual knowledge.

This argument is without merit. As noted by the court below (Pet. App. A5), the government's case on these issues was grounded on circumstantial evidence from which the jury could properly infer unlawful importation.[4] And while foreign origin is not an essential element of the offense,[5] yet this fact too was inferable from the circumstances: automobiles with Mexican license plates, the proximity of the border, and Fernandez-Ortiz driving the truck into Mexico.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

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[4] Indeed, the inference from mere possession of marihuana that it was unlawfully imported—which is not the issue here, since the government was required to prove this element—was a question expressly left open by *Leary*. In a careful analysis, the Ninth Circuit has concluded that that inference is permissible under the *Leary* rationale. *United States* v. *Avey*, 428 F. 2d 1159, 1161–1164.

[5] It is immaterial whether the marihuana was originally grown in the United States or somewhere else; 21 U.S.C. 176a speaks only of bringing marihuana *into* the United States contrary to law, without regard to its origin. See the government's Brief in Opposition in *Houle* v. *United States*, No. 5576, this Term, certiorari denied, October 26, 1970.

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